



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 23, 2023

IN THE MATTER OF:

Appeal Board No. 626652 A

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 626651 and 626652, the claimant applied to the Appeal Board pursuant to Labor Law §534 for reopening and reconsideration of Appeal

Board Nos. 624535 and 624536, filed October 19, 2022, which affirmed the March 4, 2022 decisions of the Administrative Law Judge insofar as they were appealed from, and sustained the initial determinations holding the claimant ineligible to receive benefits, effective November 3, 2020 through June 20, 2021, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$29,016 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a); and charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of \$11,700 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

Upon consideration of the application to reopen, after due notice to the parties, the Board has decided to reopen and reconsider its decisions.

Our review of the record reveals that the case should be remanded to hold a further hearing. Additional testimony and other evidence are necessary to decide the issues of the claimant's ineligibility due to lack of total unemployment, and the recoverable overpayment of PUA and FPUC benefits.

Specifically, the claimant and the employer are directed to produce a copy of the paystub (referred to by the employer's witness as an "advice") with

respect to a July 29, 2021 payment in the gross amount of \$40,990.10 made to the claimant after the parties entered into a "Stipulation of Settlement" agreement on June 9, 2021. The parties shall also produce documentation to establish the claimant's gross weekly pay at the time of his suspension in February 2020.

The employer is directed to produce a witness with firsthand knowledge of the facts and circumstances that led to a payment to the claimant in the gross amount of \$40,990.10; the reason for such payment; and the calculations that led to such payment. Since the employer's HR director testified that deductions were taken from that gross amount, resulting in a net payment to the claimant in the amount of \$1,108.47, the employer's witness shall be prepared to explain why and at whose direction those deductions were made, including a deduction in the amount of \$14,696.62 paid to the Department of Labor.

Further, since the HR director testified that the claimant's gross weekly salary was \$776.18, the employer's witness shall provide testimony and other evidence to establish whether and how the gross amount of \$40,990.10 fully compensated the claimant for the 55-week period beginning May 26, 2020 through June 16, 2021.

The employer shall also produce a witness to explain the connection between the employer and the New York State Department of Health, which entered into the Stipulation of Settlement with the claimant.

Since the claimant testified that he did not receive retroactive pay from the employer, but only received his "regular pay" in July 2021, and since the amount the claimant contends he received differed, albeit minimally, from the net amount the employer contends the claimant received, the claimant is directed to produce a copy of his July 2021 bank statement reflecting any payments and deposits made by the employer.

In addition, the claimant shall produce a copy of the statement he received from the Department of Labor reflecting an "opening balance" of \$40,555.20 with respect to overpaid benefits, and a payment of \$14,696.62 towards that amount.

Further, the Commissioner of Labor shall be represented at the remand hearing, and produce a witness to provide testimony and other evidence to establish

how the Commissioner calculated the amount of overpaid PUA and FPUC benefits the claimant is charged with having to repay, when those payments were made to the claimant, and whether, when, and how any of that total amount was repaid by or on behalf of the claimant. This evidence is needed to determine the current amount of benefits that may be recoverable from the claimant. Further, a payment made by the employer to the claimant, and the employer's act of reducing that payment by unemployment benefits paid to the claimant, may be dispositive on the issue of whether the claimant lacked total unemployment, pursuant to the decision in *Matter of Cohen*, 44 AD2d 286 (3rd Dept, 1974).

All relevant documentary evidence produced at the remand hearing, including but not limited to what the Board has directed the parties to produce, shall be received into evidence after the appropriate confrontation and opportunity for objection.

The parties are placed on notice that failure to produce the witnesses and other evidence directed by the Board may result in the hearing Judge or the Board taking an adverse inference against that party, and concluding that the evidence not produced would not have supported that party's position.

The hearing Judge may receive into the record any other evidence needed to decide the matter.

Now, based on all of the foregoing, it is

ORDERED, that the October 19, 2022 decisions of the Appeal Board in Appeal Board Nos. 624535 and 624536, be, and the same hereby are, rescinded; and it is further

ORDERED, that the March 4, 2022 decisions of the Administrative Law Judge, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective November 3, 2020 through June 20, 2021 on the basis that the claimant was not totally unemployed; and charging

the claimant with an overpayment of \$29,016 in PUA benefits, and an overpayment of \$11,700 in FPUC benefits, recoverable pursuant to the provisions of the CARES Act of 2020, be, and the same hereby are, rescinded; and it is further

ORDERED, that the cases shall be, and the same hereby are, remanded to the

Hearing Section to hold a hearing on the issues of total unemployment and the recoverable overpayment of PUA and FPUC benefits, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above actions to be taken, and so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision on the initial determinations holding the claimant ineligible to receive benefits effective November 3, 2020 through June 20, 2021 on the basis that the claimant was not totally unemployed; and charging the claimant with an overpayment of \$29,016 in PUA benefits, and an overpayment of \$11,700 in FPUC benefits, recoverable pursuant to the provisions of the CARES Act of 2020, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER